Supreme Court, U.S.
FILED
APR 9 1998
CLERK

No. 97-1508

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ERNEST HAVNER, *et al.*,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF FOR RESPONDENT MERRELL DOW IN OPPOSITION

RICHARD G. TARANTO
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

12 pp.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
JURISDICTION	1
STATEMENT	1
ARGUMENT	3
1. The Judgment Against The Havners for Merrell Dow	3
2. The Orders Relating to Attorney Discipline	7
CONCLUSION	9

TABLE OF AUTHORITIES

Cases Page

Adams v. Robertson, 117 S. Ct. 1028 (1997) 6
Blum v. Merrell Dow Pharmaceuticals, Inc., No. 3711 Philadelphia 1995 (Superior Ct. Pa. Dec. 29, 1997) 2
Brown v. Francis, 75 F.3d 860 (3rd Cir. 1996) 4
Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 4
Cooter & Gell v. Hartmarx Corp., 496 U.S. 384 (1990) 5
Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 8
Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993) 1
Department of Banking v. Pink, 317 U.S. 264 (1942) 4, 7
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 8
In re Sawyer, 360 U.S. 622 (1959) 8
Pennsylvania v. Ritchie, 480 U.S. 39 (1987) 4, 7
Turnbull v. Wilcken, 893 F.2d 256 (10th Cir. 1990) 4
Willy v. Coastal Corp., 503 U.S. 131 (1992) 5

Statutes and Rules

28 U.S.C. § 1257 ..... 3, 4, 7
§ 1291 4
§ 2101(c) 3
Supreme Court Rule 13.1 3
13.3 3
29.6 1

Other Authorities

R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* (7th ed. 1993) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-1508

ERNEST HAVNER, *et al.*,
Petitioners,

v.

MERRELL DOW PHARMACEUTICALS, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF FOR RESPONDENT MERRELL DOW IN OPPOSITION

JURISDICTION

For reasons set forth at pages 3-4 & 7-8 below, this Court lacks jurisdiction.

STATEMENT

This is a Bendectin case like *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). *See* Pet. 3 ("nature of the litigation is effectively identical to" *Daubert*). It was brought by the Havner petitioners against respondent Merrell Dow in state court in Texas.[1]

---

[1] Pursuant to Rule 29.6 of the Rules of this Court, respondent Merrell Dow Phamaceuticals, Inc. (now named Merrell Pharmaceuticals, Inc.) states that it is a wholly owned subsidiary of Hoechst

A 1991 trial resulted in a jury verdict for the Havners. After review in the intermediate appellate court, the Texas Supreme Court held that the Havners lacked sufficient evidence meeting minimum standards of scientific reliability to establish that Bendectin caused Kelly Havner's birth defect, and the court therefore ordered judgment for Merrell Dow. Pet. App. 1-66. The court's judgment accords with the result in every one of the numerous other Bendectin cases brought against Merrell Dow—all of which, to date, have been resolved in Merrell Dow's favor before trial, at trial, or on subsequent review. *See* Pet. App. 5-9 (citing decisions).[2]

The Havners filed a timely motion for rehearing (Pet. App. 67-112), which was denied on November 13, 1997, without an opinion on the substance of the motion (Pet. App. 113-117). In the order denying rehearing, the Texas Supreme Court directed the attorneys for the Havners to show cause why they should not be disciplined or subjected to sanctions for specified passages in their motion for rehearing. Pet. App. 116. After the attorneys responded (Pet. App. 133-291), the Texas Supreme Court, on December 11, 1997, decided that it would not impose any sanctions and instead referred two of the attorneys—who are among the petitioners here—to bar committees "for any disciplinary action that may be appropriate" (Pet. App. 292). Merrell Dow did not participate in the show-cause proceedings.

Marion Roussel, Inc. (formerly Marion Merrell Dow Inc.), which is owned by HMR Pharma, Inc., and Roussel Uclaf. The latter two companies are in turn wholly owned by Hoechst AG. Respondent has three foreign subsidiaries in which stock may be publicly available: Marion Merrell S.A. (Spain); Gruppo Lepetit S.p.A. (Italy); and Marion Merrell S.A. (France).

[2] The Pennsylvania trial court's adverse judgment in the *Blum* case, cited at Pet. App. 7, has been reversed on appellate review. *See Blum v. Merrell Dow Pharmaceuticals, Inc.*, No. 3711 Philadelphia 1995 (Superior Ct. Pa. Dec. 29, 1997).

ARGUMENT

The Court lacks jurisdiction under 28 U.S.C. §§ 1257 and 2101(c) to review any of the several orders of the Texas Supreme Court challenged in the petition. In any event, the petition presents no issue on the merits warranting this Court's review. Accordingly, the petition should be denied.

1. *The Judgment Against The Havners For Merrell Dow.* a. The Court lacks jurisdiction to review the judgment against the Havners on their claim against Merrell Dow, because the petition, filed March 11, 1998, is out of time. The Texas Supreme Court entered its judgment against the Havners on July 9, 1997, and denied a timely motion for rehearing on November 13, 1997. Pet. App. 60, 113-117. The denial of rehearing rendered the judgment for Merrell Dow against the Havners final for purposes of certiorari to this Court under 28 U.S.C. § 1257. The 90-day period authorized for a petition under 28 U.S.C. § 2101(c) and this Court's Rules 13.1 and 13.3 elapsed on February 11, 1998. No extension of time was sought or obtained. The petition, filed a month after it was due, was therefore untimely insofar as it challenges the judgment against the Havners in favor of Merrell Dow.

The Havners contend otherwise (Pet. 2, 1-14) by arguing that there was no final judgment when rehearing was denied on November 13, 1997, because the Texas Supreme Court simultaneously ordered the Havners' attorneys to show cause why they, the attorneys, should not be sanctioned or referred for discipline. Pet. App. 113-117. Because further proceedings were thus contemplated, the petition argues, the 90-day clock did not begin to run until the Texas Supreme Court created a final judgment, on December 11, 1997, by referring two of the attorneys to bar committees "for any disciplinary action that may be appropriate." Pet. App. 292-293. Although petitioners

could have filed the petition any time within the next two months and still met the deadline of February 11, 1998, they waited an additional month to file. The timeliness of the petition thus turns entirely on the contention that the finality of the July 1997 judgment effected by the November 1997 denial of rehearing was destroyed by the show-cause order to the attorneys. That contention should be rejected.

The November 1997 denial of rehearing fully resolved all the claims among the parties to the case, thus meeting the basic test of finality (a matter of federal law, *see Department of Banking v. Pink*, 317 U.S. 264, 268 (1942)): "it ended the litigation by fully determining the rights of the parties" (*id.* at 267). Upon denial of rehearing, this case was not one in which "the state courts still must conduct further substantive proceedings before the rights of the parties as to the federal issues are resolved." *Pennsylvania v. Ritchie*, 480 U.S. 39, 47 (1987), quoted at Pet. 11. Rather, the further proceedings contemplated by the show-cause order here involved only the attorneys, not the parties, and involved issues that were entirely collateral to all of the claims in the case. It is settled that pendency of attorney-fees or party-sanction proceedings, even though directly involving the parties, does not destroy finality of a merits judgment for purposes of the court of appeals' jurisdiction under 28 U.S.C. § 1291, precisely because of the collateral nature of such proceedings. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988); *Brown v. Francis*, 75 F.3d 860, 864 n.3 (3d Cir. 1996); *Turnbull v. Wilcken*, 893 F.2d 256, 257 (10th Cir. 1990). With finality for purposes of this Court's jurisdiction under 28 U.S.C. § 1257 given at least as "practical" an approach, *see Budinich*, 486 U.S. at 201-02 (expressly drawing on § 1257 for ruling under § 1291), it follows *a fortiori* that finality of the judgment on the merits between the parties cannot be destroyed by

the even more collateral matter of disciplinary or other sanctions proceedings directed solely at an attorney. *Cf. Willy v. Coastal Corp.*, 503 U.S. 131, 137-38 (1992) (collateral nature of Rule 11 sanctions); *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 395-96 (1990) (same).[3]

Thus, the November 13, 1997, denial of rehearing in this case rendered the judgment for Merrell Dow against the Havners final. The petition to review that judgment was due February 11, 1998. The petition, not filed until March 11, 1998, was out of time.

b. Even aside from the jurisdictional defect, review of the July 1997 judgment against the Havners on their claim against Merrell Dow should be denied. Neither of the Havners' two challenges to the judgment warrants review.

The petition's first challenge is devoid of substance. The Havners contend (Pet. i (question #1); Pet. 17) that the Texas Supreme Court "may have" retaliated (Pet. 4) or did retaliate (Pet. 6) against the Havners on the merits because of the language their attorneys used in their motion for rehearing. A speculation like this, supported by not the slightest bit of evidence, does not warrant review.

The petition also challenges the July 1997 judgment on the ground that the Texas Supreme Court violated the federal due process and equal protection clauses by applying a different state-law evidentiary standard to the causation than was applicable at trial, yet not remanding for a new trial. *See* Pet. ii (question #3); Pet. 15-17. The threshold difficulty with this contention is that these federal constitutional grounds were not raised either before the Texas Supreme Court rendered its judgment or in the

---

[3] Contrary to petitioners' suggestion (Pet. 6 n.7), the formalities of docket numbers cannot make a difference, as attorney fees and Rule 11 proceedings would ordinarily be carried out under the same docket.

Havners' timely motion for rehearing. *See* Pet. App. 78-96.[4] As the petition effectively concedes (Pet. 17 n.17), a federal due process claim (but not an equal protection claim) was raised in the second motion for rehearing (Pet. App. 319-325), but the Texas Supreme Court denied leave to file that motion as unauthorized under Texas rules (Pet. App. 330). The new federal constitutional claims not having been properly raised (or actually decided) below, their review in this Court is barred (whether as a jurisdictional or prudential matter). *See, e.g., Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997).

Petitioners' contention would not warrant review even if it had been adequately preserved. The Texas Supreme Court did not announce or establish any principle of federal law for this Court to review; and the Texas-law rule that "the justice of the cause" determines whether to order a new trial in a particular case (*see* Pet. App. 89) cannot be challenged as unconstitutional. The application of that rule here, moreover, raises no substantial question of federal law. No federal constitutional principle forbids a state supreme court to carry out the normal common-law process of elaboration and clarification of evidentiary standards or to make a determination that a particular clarification of a particular standard does not require a new trial in a particular case because there could be no material difference in the evidence presented or, more importantly, in the outcome. This case thus involves, at most, fact-specific judgments that the Texas Supreme Court opinion merely elaborated and clarified longstanding Texas-law standards demanding nonconjectural, reliable evidence to support a verdict; that petitioners had every incentive to make their best case for reliability at the time of trial; and that, in light of the mass of other

[4] The "Statement" portion of the motion for rehearing makes one unelaborated and inexplicable reference to "the Sixth Amendment." Pet. App. 75. No federal constitutional issue of any sort is raised in the motion for rehearing as a point of error or in the Argument section.

Bendectin cases reflecting the same packet of consistently inadequate causation evidence, there was no point in a remand. None of those implicit judgments warrant this Court's review.[5]

2. *The Orders Relating to Attorney Discipline.* a. The petition is jurisdictionally defective not only insofar as it seeks review of the judgment for Merrell Dow against the Havners, but also insofar as it seeks review of the discipline-related orders directed at the Havners' attorneys.[6] Those orders—the November 1997 show-cause order and the December 1997 order merely referring the attorneys to bar committees for possible disciplinary action—are not final. The orders did not "end[] the litigation by fully determining the rights of the [attorneys]" (*Department of Banking v. Pink*, 317 U.S. at 267); "further substantive proceedings" are still specifically contemplated "before the rights of the [attorneys] as to the federal issues are resolved" (*Pennsylvania v. Ritchie*, 480 U.S. at 47). At present, the only action taken has been a referral for further proceedings, and the attorneys' First Amendment claims will be available for any appropriate review upon completion of those proceedings, if any disciplinary action is ultimately taken. Thus, the petition's challenge to the discipline-related orders is premature: those orders are not "final judgments" as required by 28 U.S.C. § 1257. *Cf.* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 3.7, at 107-08 (7th ed. 1993) (finality

---

[5] To the extent that petitioners suggest a federal-law duty to write an opinion in denying rehearing (Pet. 17), even on state-law issues, the suggestion is baseless and conflicts with the routine practice of appellate courts.

[6] These latter orders do not directly involve Merrell Dow. Because petitioners nevertheless seek to use the discipline-related orders to delay the final conclusion of the Havners' case against Merrell Dow, the petition's challenge to those orders is briefly addressed here.

generally lacking where state court remands to administrative agency).[7]

b. In any event, the petition's challenge to the discipline-related orders—contending that those orders denied counsel's First Amendment right to criticize the court (Pet. i (question #2); Pet. 18-22)—does not warrant review. In *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), which the petition fails to cite, this Court reaffirmed that special circumscribed standards apply to an attorney's speech "in the courtroom itself, during a judicial proceeding." *Id.* at 1071; *see In re Sawyer*, 360 U.S. 622 (1959). If the relevant First Amendment standards are accordingly not absolutist, but instead call for context-specific judgments, review here is at least premature (as a prudential as well as jurisdictional matter). The Texas Supreme Court did not hold anyone in contempt or impose any sanctions; it merely referred two attorneys to bar committees "for any disciplinary action that may be appropriate" (Pet. App. 292). The petition cites no authority from this Court or from any lower court finding a First Amendment violation based on the mere initiation of such proceedings. Whether petitioners have any First Amendment claim warranting review should await the outcome of the proceedings, where the bar committees can consider and address petitioners' contentions in light of the traditions and needs of the state-court judicial system.

---

[7] This case involves none of the exceptions described in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975): the First Amendment issue has not been finally decided below and may not be conclusive of the dispute; the outcome of bar-committee proceedings is not preordained; the First Amendment issue may not survive or require decision after those proceedings; if it does, review of the claim can be had later; and there is no realistic threat of eroding federal policy by allowing initiation of such bar proceedings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD G. TARANTO
FARR & TARANTO
2445 M Street, NW
Suite 225
Washington, DC 20037
(202) 775-0184

April 10, 1998